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May 29, 1997

RECEIVED
Via Federal Express
MAY 30 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

FCC MAIL ROOM

Re: Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations; Reply Comments of the Small Cable Business Association; MM Docket No. 93-25

Dear Mr. Caton:

We enclose for filing an original and 4 copies of the Reply Comments of the Small Cable Business Association in the above-referenced matter. Also enclosed is a copy to date-stamp and return in the pre-addressed Federal Express envelope.

Very truly yours,

Howard & Howard



Eric E. Breisach

EEB:cm

Enclosures

cc: Matthew Polka, Esq.
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of Section 25 of the)
Cable Television Consumer Protection and)
Competition Act of 1992,)
Direct Broadcast Satellite Service Obligations)

MM Docket No. 93-25

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**REPLY COMMENTS OF THE
SMALL CABLE BUSINESS ASSOCIATION**

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May 30, 1997

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I. SUMMARY

Silence speaks volumes. Most DBS commentators simply avoided any discussion of the Congressional mandate that the Commission either find ways for DBS to support localism or regulate it so that DBS does not harm localism. The handful of DBS comments that addressed this issue advocated a continued "hands off" approach because DBS remains a fledgling industry warranting special treatment. The Commission's 1993 rationale supporting its decision to forego regulation to promote and preserve localism no longer holds water. The DBS industry has transformed itself from a "nascent industry" offering few channels to few subscribers to one backed by some of the largest media companies in the world. These DBS providers offer hundreds of channels to millions of subscribers. The Commission must now focus on fulfilling its statutory mandate to regulate the DBS industry to promote and preserve the longstanding principle of localism.

The contradictions between comments filed by various DBS providers impeach those comments. For example, DBS providers pretend to speak in a singular voice about regulation. Virtually all proclaim DBS as a unique "national programming source" with its national character being its competitive strength and the reason why imposition of local interest obligations becomes inconsistent. At this point, however, the schizophrenic personality of the DBS industry emerges. Some DBS providers argue that they will not provide local programming. Others, including several major players, argue that they must carry some local signals to compete -- but only those signals that they want to carry because, after all, they claim to be a national programming service. Even Primestar, which in its comments argues that DBS provides predominantly national programming services, must admit that, with its reported merger with ASkyB, its focus may change dramatically to carriage of local signals.

DBS, by at least one commentator's own admission¹, hurts localism. The Commission must stop this harm now by either imposing local program carriage requirements on DBS or by requiring those who fail to fulfill local programming requirements to make contributions to a local programming support fund. Most DBS commentators ducked this critical statutory mandate. SCBA respectfully requests that the Commission step up to the plate and squarely address this issue that remains crucial to residents of rural America.

¹Comments of EchoStar Communications Corporation at 6.

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**REPLY COMMENTS OF THE
SMALL CABLE BUSINESS ASSOCIATION**

II. INTRODUCTION

The DBS comments reflect a severe identity crisis within the DBS industry. DBS wants special protection from local programming mandates because it provides a unique national programming service.² In the next breath, major DBS providers speak to the need to provide local programming³ of their choice in order to compete effectively with cable. They then, however, return to the theme that DBS should remain exempt from local programming requirements because DBS provides national programming.

The Small Cable Business Association ("SCBA") has presented in its comments a plan to establish regulatory and financial parity between DBS and cable in a way that helps preserve local programming.⁴ With few exceptions, the commentators in this proceeding ignore the

² See, e.g., Further Comments of the Satellite Broadcasting and Communications Association of America, at 3.

³ See, Comments of EchoStar Communications Corporation, at 2.

⁴ See, *Comments of the Small Cable Business Association* filed April 28, 1997 ("SCBA Comments").

principle of "localism" and the preservation of local programming, as imposed by the Congressional mandate on the Commission.

SCBA focuses these reply comments on important points raised by other commentors and, equally important, points avoided by DBS commentors.

III. DBS IS A THRIVING INDUSTRY THAT DIRECTLY COMPETES WITH CABLE

In 1993, Congress directed the Commission to either enact rules that require the carriage of local programming on DBS or, in the alternative, regulate DBS to protect local programming.⁵ Initially, the Commission tentatively chose not to adopt local public interest obligations for DBS providers.

Subsequently, by the Commission's own admission, "the DBS industry has grown and changed dramatically."⁶ The DBS industry has demonstrated its ability to effectively compete for cable television subscribers. Virtually all commentors, to some extent, recognize that "DBS is now a formidable competitor to cable television..."⁷ DBS no longer represents the "nascent"

⁵ 47 USC § 335(a).

⁶ *Public Notice*, FCC 97-24 (January 31, 1997).

⁷ Comments of the National Cable Television Association, Inc., at 2. *See*, Further Comments of the Satellite Broadcasting and Communications Association of America, at 2 ("Since [1993], the DBS operating environment has changed significantly. There are now five active DBS providers offering private subscription satellite services to the public, with another provider expected to launch operations within the next 12 months."); Comments of American Sky Broadcasting LLC, at 3 ("In the four years since Section 25 was enacted, the DBS industry has undergone dramatic and dynamic change...The continuing rapid development of DBS service will challenge the Commission in implementing the statutory mandates of Section 25 that were adopted in a different era."); Comments of U.S. West, Inc., at 2 ("Over the past two years, DBS providers including Direct TV, PrimeStar, and U.S. Satellite Broadcasting ("USSB") have experienced substantial subscriber growth."); Comments of Research TV, at ii ("When Congress enacted the DBS 'set aside' provision in 1992, the future of the DBS industry was unclear at best. Today, DBS is a multi-billion dollar industry dominated by some of the nation's largest communication conglomerates. Estimates are that the DBS industry will grow to around 15 million subscribers by the year 2000. DBS dishes have already become the fastest selling consumer electronics device in history."); Supplemental Comments of Direct TV, Inc., at 2 ("DBS subscribership has increased substantially to the point that DBS systems have a higher combined subscribership than any other MVPD alternative to incumbent cable systems."); Comments of Encore Media Corporation, at 2 ("At the time the NPRM was issued in 1993, there was only a single DBS system actually operating, offering only a dozen analog video channels to subscribers. By contrast, there are now five major competitive DBS operations serving approximately five million

industry the Commission saw in 1993. The Commission's rationale in 1993 for taking a hands off approach to regulation of a fledgling industry no longer exists. The DBS industry is alive, well and flourishing. As a result, it hurts localism. DBS' plans for the future threaten to destroy local programming. The Commission must now turn to implementing its Congressional mandate to regulate DBS to protect and promote localism.

IV. THE COMMISSION MUST PRESERVE AND PROMOTE LOCALISM

A. Congress Mandated Commission Regulations that Further the Principle of Localism

The commentators in this proceeding spend much time debating the appropriate set aside requirements of Section 25(b) of the Act.⁸ Few commentators point to the additional Congressional mandate that the Commission examine opportunities to regulate the DBS industry to further the principle of localism. This, despite the fact that the principle of localism has permeated United States mass communications policy for the past 63 years. Congress first mandated localism in 1934.⁹ Congress and the Commission have consistently protected and promoted localism in the implementation of subsequent telecommunications policy.¹⁰

Congress brought the localism requirement home to DBS in 1992 when it ordered the Commission to undertake this proceeding:

subscribers nationwide, and the mass media trade press has been consumed of late with story after story about the merger of one of these existing systems, EchoStar, with one of the major worldwide providers of DBS outside the United States, Newscorp.").

⁸ Predictably, DBS operators argue for a minimal four percent channel set aside and "maximum flexibility" in fulfilling the requirement for non-commercial, educational/informational programming. *See*, Further Comments of the Satellite Broadcasting and Communications Association of America; Comments of America Sky Broadcasting, LLC; and Supplemental Comments of Direct TV, Inc.

⁹ 47 USC § 307(b).

¹⁰ *See*, SCBA Comments, at 4-6.

Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.¹¹

Congress mandated fair play. Now the Commission must establish rules to ensure fair competition.

B. DBS Harms Local Programming

DBS providers perpetuate the myth that they provide a unique national programming service. DBS providers concede that they have "no truly local presence."¹² Because of the "national" scope of DBS service, DBS providers argue that "the public service programming of interest to local audiences most likely would not be appealing to a national viewing base."¹³ Due to the "inherently national scope and non-local nature of DBS services,"¹⁴ DBS operators see no opportunity for the Commission to develop regulations that would foster the principle of localism. One DBS operator put it this way:

With respect to the principle of localism, EchoStar agrees with the Commission that no additional regulation of DBS providers is warranted. The public service obligations imposed on DBS providers should not be affected by any technological developments in the area of local signal retransmission through spot beam technology. EchoStar's plan to offer local signals to make EchoStar a more effective competitor against dominant cable operators in the MVPD marketplace must not be used as a basis for imposing additional regulations on entrepreneurial DBS companies.¹⁵

¹¹ 47 U.S.C. § 335(a) (emphasis added).

¹² Further Comments of the Satellite Broadcasting and Communications Association of America, at 3.

¹³ *Id.*

¹⁴ Supplemental Comments of Direct TV, Inc., at 19.

¹⁵ Comments of EchoStar Communications Corporation, at 2.

This admission speaks volumes. First, the unique "national" nature of DBS programming cannot compete with cable's "local presence" and local programming. Second, in order to compete effectively, DBS cannot undertake the localism requirements imposed on cable and other multichannel video programming providers, including open video systems. DBS seeks to provide local programming services without any of the accompanying obligations or restrictions imposed on cable or other providers such as open video systems.

The DBS industry has no uniform approach to the transmission of local broadcast services. EchoStar and American Sky Broadcasting (ASkyB) intend to spot beam select local broadcast stations, principally in larger urban areas, so that they can "become. . . more effective competitor[s] in the MVPD market."¹⁶ Others have no immediate intention of carrying local broadcast signals.¹⁷ Under either scenario, DBS service hurts local broadcast stations and local programming.

Under the EchoStar and ASkyB scenario, both will cherry pick and spot beam select local broadcast stations so that they can more effectively market their services to existing cable television subscribers. Without regulation, EchoStar and ASkyB do this at the expense of small local broadcast stations and viewers in rural markets. Cable operators cannot pick and choose the broadcast stations that they will transmit over their systems. Long ago, the Commission and more recently Congress, determined that preserving the viability of local broadcast stations outweighed a cable operator's interest in selectively choosing the broadcast signals it would transmit over its system. DBS is no different. Allowing DBS operators to pick and choose local

¹⁶ Comments of EchoStar Communications Corporation, at 6.

¹⁷ Prepared Testimony of Stanley Hubbard before the Senate Committee on Commerce, Science and Technology, at 24.

broadcast signals unhampered by the same localism obligations imposed on cable will hurt small local broadcast stations and the viewers in rural America who depend on them.

Those DBS operators not providing local broadcast service also damage local broadcast stations. DBS provides not just differentiated national programming, but many DBS subscribers receive duplicative broadcast network programming that directly competes with local broadcasters in violation of the Satellite Home Viewer Act.¹⁸ One commentator even admitted that the failure to carry local programming hurts localism:

Any new regulation imposed on EchoStar by virtue of its local retransmission plan would decrease its ability and economic incentive to compete head-to-head against cable operators and thereby damage, instead of furthering, the principle of localism.¹⁹

Every DBS subscriber gain represents a loss to the local broadcast station and most importantly, a loss to the cable operator. More than 30 years ago, the Commission found the loss of local broadcast viewership by a cable subscriber unacceptable.²⁰ Then, the Commission reasoned that the failure of a cable system to carry a local broadcast station "has in practical effect cut off the station from access to CATV subscribers," a result the Commission found to be "unreasonable," "destructive" and "contrary to the public interest."²¹ DBS poses the identical threat to local broadcasters.

The must-carry statute compels cable operators to carry local broadcast signals. Cable operators are also prohibited from exacting a fee from local broadcast stations exerting must carry

¹⁸Testimony of Rupert Murdoch, CEO, The News Corporation, Transcript of Hearings before the Senate Committee on Communications, Science and Technology, April 10, 1997, at 16.

¹⁹Comments of EchoStar Communications Corporation, at 6.

²⁰ *Second Report and Order*, 2 FCC 2d 725 (1966) at ¶ 26.

²¹ *Id.*

rights. These rules that protect the viability of local broadcast stations and help preserve local programming must extend to DBS.

Congress and the Commission have imposed detailed regulatory obligations upon cable television operators to preserve the principle of localism and create a level playing field between video programming service providers. Therefore, the question for the Commission becomes how best to regulate the DBS industry to preserve the principle of localism.

C. The Commission Must Adopt Reasonable Regulations that Promote Localism

1. DBS Providers Oppose "Localism" Obligations

DBS providers advocate continued exemption from localism obligations. EchoStar argues that, even as it begins to add local signals to its offering, the Commission should only regulate the local carriage obligations of cable television, not DBS. EchoStar states that this will "level the playing field."²² A level playing field cannot exist under the Commission's current regulatory policy. DBS has enjoyed four years of regulatory freedom. Now that DBS and cable compete head-to-head for the same subscribers, the Commission must remove the advantages afforded the DBS industry, especially in light of the Congressional mandate that DBS must further localism or at least ensure that DBS does not harm localism.

2. The Cable Industry Seeks Regulatory and Financial Parity

Cable industry commentators, including SCBA, seek regulatory and financial parity. Certain cable industry commentators argue that financial and regulatory parity can be achieved by the imposition of comparable regulatory burdens upon DBS providers that provide local service.²³ Equalizing the financial and regulating burdens between cable and DBS providing "local" service

²² Comments of EchoStar Communications Corporation, at 6

²³ See, e.g., Comments of National Cable Television Association, Inc. and Comments of Time Warner Cable.

is essential, but does not go far enough. Even DBS operators that provide no local service endanger local broadcast stations and local programming, foisting the burden of supporting local programming especially upon small cable operators and small local broadcasters that reach a shrinking viewership.

3. Uniform DBS Regulation Promotes Localism

SCBA presented a plan that achieves two fundamental regulatory goals: (1) it creates financial and regulatory parity between cable and DBS; and (2) it preserves the financial viability of local broadcast stations and local programming.

SCBA recognizes that DBS currently provides a national, non-local service. DBS still, however, adversely impacts local broadcast stations and local programming. As DBS operators that do not provide local broadcast service gain viewership -- especially those that illegally import duplicative broadcast network programming -- local broadcast stations lose viewership. As DBS continues its rapid expansion, the threat to local broadcast stations will dramatically increase.

DBS should contribute its fair share for preserving the principle of localism, either by carrying all local programming or compensating local programmers for the harm inflicted. The Commission should impose uniformly applicable must-carry and other program carriage requirements and restrictions on DBS. If a DBS provider cannot, or chooses not to, comply with the requirements, it should have the ability to opt out and instead contribute a percentage of subscriber revenues to a fund dedicated to the promotion and preservation of local programming.²⁴

DBS should also bear financial burdens comparable to those of cable operators. Like cable and open video system providers, DBS operators should pay ongoing spectrum use fees

²⁴ See, SCBA Comments at 23-24.

(comparable to franchise and surrogate fees paid by cable and OVS) as well as PEG access and other fees paid by cable operators to local franchise authorities.

Finally, Congress should remove the special protection DBS enjoys through certain exemptions from local taxation.

V. CONCLUSION

SCBA presents in its initial comments a plan to establish regulatory and financial parity between cable and DBS in a way that helps preserve local programming. DBS commentators describe the transformation of the DBS industry between 1993 and today as "dramatic and dynamic"²⁵ leading to the "rapid development and deployment of DBS services by multiple providers..."²⁶. The Commission should no longer shield DBS from its obligations to preserve and promote local programming. The regulatory structure SCBA proposes preserves local programming and benefits viewers in rural America. Congress mandated that the Commission regulate the DBS industry to preserve the principle of localism. SCBA respectfully requests that


²⁵ Comments of American Sky Broadcasting, LLC, at 3.

²⁶ Supplemental Comments of Direct TV, Inc., at 2.

the Commission adopt the provisions outlined by SCBA in its initial comments to create financial and regulatory parity between cable and DBS in a way that helps preserve local programming.

Respectfully submitted,

SMALL CABLE BUSINESS ASSOCIATION

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CERTIFICATE OF SERVICE

I, Carol L. Malmud, a secretary at the law firm of Howard & Howard, do hereby certify that a copy of the foregoing "Reply Comments of the Small Cable Business Association" was sent via first class mail, postage prepaid to the following persons, this 29th day of May, 1997.

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